

White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005

Tel + 1 202 626 3600
Fax + 1 202 639 9355
www.whitecase.com

January 16, 2007

PUBLIC DOCUMENT

Susan H. Kuhbach
Senior Office Director
Import Administration
U.S. Department of Commerce
Central Records Unit - Room 1870
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230

Attn: Susan H. Kuhbach; Callie Conroy; David Layton

Re: Application of the Countervailing Duty Law to Imports from China

Dear Ms. Kuhbach:

We write on behalf of Gold East Paper (Jiangsu) Co., Ltd. and Gold Hua Sheng Paper Co., Ltd., producers and exporters of coated free sheet paper from China, and pursuant to the Commerce Department's notice published in the *Federal Register* on December 15, 2006 soliciting comments on whether the countervailing duty ("CVD") law should be applied to imports from the People's Republic of China. As requested, we are submitting a signed original and eight copies of the comments, along with an electronic version in PDF format.

We see no justification for the Commerce Department to change its long-standing rule that it will apply the CVD law only where a market economy exists. The Department has stated clearly in the past that the essential factual predicate for application of countervailing duties – the existence of a “benefit” from the alleged subsidy – is measurable only in a market economy. Any changes to this well-established rule must address directly and clearly why this factual predicate is different now, or why the Department’s evaluation of those facts has changed.

Discussion

The Commerce Department is proposing a radical change in the rules governing application of the CVD law. The Department’s longstanding rule precludes application of the CVD law unless the Department also finds that a market economy exists. *Carbon Steel Wire Rod From Czechoslovakia*, 49 Fed. Reg. 19370 (May 7, 1984); *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 19374 (May 7, 1984); *Potassium Chloride From the German Democratic Republic*, 49 Fed. Reg. 23428 (June 6, 1984); *Potassium Chloride From the Soviet Union*, 49 Fed. Reg. 23428 (June 6, 1984). In these cases, the Department reasoned, correctly, that in a country that it has determined to be an NME it is impossible to determine the benefit from an alleged subsidy because prices and costs are not a reliable measure of value.

The Court of Appeals for the Federal Circuit in *Georgetown Steel* upheld the Department’s position that the CVD law applies only where a market economy exists. *Georgetown Steel v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). The Court of Appeals found that Congress had intended to address unfair pricing by exporters from NME countries through the application of the antidumping law, and there was no indication that Congress had intended or understood that the CVD law would also apply to NMEs. *Id.* at 1316-18. The Court stated that “[i]f [antidumping] is inadequate to protect American industry from such foreign

January 16, 2007

competition [resulting from sales in the United States of merchandise that is priced below its fair value] it is up to Congress to provide any additional remedies it deems appropriate.” *Id.* at 1318.

Congress on several occasions since the *Georgetown Steel* decision has affirmed the Department’s rule that it will apply the CVD law only where it finds that a market economy exists. In 1988, two years after *Georgetown Steel*, Congress amended both the CVD law and NME antidumping provisions of the law, and did not change the legal framework to provide for the application of the CVD law to NMEs.¹ Congress subsequently adopted the Uruguay Round Agreements Act (“URAA”) in 1994, amending the CVD law, but did not add language that would have allowed the Commerce Department to apply the CVD law to NME countries.² In the Statement of Administrative Action accompanying the URAA, the U.S. Government acknowledged that *Georgetown Steel* stood for “the reasonable proposition that the CVD law cannot be applied to imports from nonmarket economy countries.”³

The Department reaffirmed this position as recently as 2002 in *Sulfanilic Acid from Hungary*. In that case the Department determined that subsidies occurring prior to Hungary’s graduation from an NME to market economy country could not be countervailable. *Sulfanilic Acid from Hungary*, 67 Fed. Reg. 60223 (September 25, 2002) and accompanying *Issues and Decision Memorandum* at Comment 1. This reasoning, which has supported the Department’s consistently applied decision not to impose countervailing duties on NME products for the last 20 years, was paraphrased in a recent GAO report:

¹ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

² Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4813 (1994).

³ Statement of Administrative Action, H.R. Doc. No. 103-316, pt. 1 at 926 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4240.

January 16, 2007

Governments with nonmarket economies control their trading entities by determining where, when, and what they will sell, and upon what terms. When no market exists, subsidies cannot be found to distort market decisions.⁴

The Commerce Department has an established legal mechanism – the “market-oriented industry” (or “MOI”) test – for determining those circumstances under which prices and costs in an NME country may be used in the calculation of dumping margins. This test also has governed the circumstances under which the Department has considered applying the CVD law to a specific industry within an NME. *See Oscillating and Ceiling Fans from China*, 57 Fed. Reg. 24018-2 (June 5, 1992). In the *Fans* case, the Department stated that because of the lack of market conditions in the industry, “subsidies to the NME producer become irrelevant – any AD margin would not be calculated using NME prices potentially influenced by subsidies.” *Id.* *See also Chrome-Plated Lug Nuts and Wheel Locks from China*, 57 Fed. Reg. 10459-10460 (March 26, 1992) (stating that if the MOI conditions are not met, the producers will be treated as NME producers and the CVD law may not be applied).⁵

Any changes to the Department’s approach to the issue of subsidies in NME cases must address directly and clearly the factual predicate of the Department’s traditional position. The Department consistently expressed the view that a “benefit” could be neither identified nor quantified in NME countries, and it provided specific arguments as to why it reached this conclusion. It is incumbent on the Department to explain why these arguments no longer apply

⁴ *Challenges and Choices to Apply Countervailing Duties to China*, 4 April 2006, page 9.

⁵ The Department has never found that an NME industry meets the prescribed market conditions to satisfy the MOI test, which requires an unrealistic level of industry-wide cooperation in the submission and verification of information. A more logical approach would be to adopt rules for company-specific market-economy findings modeled on those used by the European Commission. *See* Article 2(7), Council Regulation (E.C.) 905/98 (1998) O.J. L128/18; Commission Decision 1000/1999, O.J. L122/35 (12.05.99), *as amended*. In any event, application of the CVD law to China would require that the Department revise the MOI test so as to ensure consistent application of the standard provisions of the antidumping law, in strict conformity with the WTO Antidumping Agreement.

January 16, 2007

prior to conducting a CVD investigation: what are the differences in the underlying facts, or the differences in the Department's analysis of the underlying facts that justify the radical shift in position? The change should not be made for the purpose of change itself, or for the expediency of the moment.

Conclusion

We respectfully submit that the Commerce Department should not apply the CVD law to China unless the Department revokes China's status as a non-market economy ("NME") country or otherwise finds that market conditions also permit application of the standard provisions of the antidumping law.

Sincerely yours,



White & Case LLP
William J. Clinton
Walter J. Spak
Emily Lawson
Scott Lincicome

On behalf of Gold East Paper (Jiangsu) Co., Ltd.
and Gold Hua Sheng Paper Co., Ltd.